

United States  
Circuit Court of Appeals

For the Ninth Circuit.

— 9

INLAND POWER AND LIGHT COMPANY,  
a corporation,

Appellant,

vs.

FAY M. GRIEGER and MARY LOIS GRIEGER,  
Appellees.

Appellant's Reply Brief

---

Upon Appeal from the District Court of the United States  
for the Western District of Washington,  
Southern Division.

ELLIS & EVANS,  
Overton G. Ellis,  
Robert E. Evans,  
1205 Rust Bldg.,  
Tacoma, Washington.

LAING & GRAY,  
John A. Laing,  
Henry S. Gray,  
1504 Public Service Bldg.,  
Portland, Oregon,  
Attorneys for Appellant.

Filed

SEP 28 1937

PAUL F. COOPER,

CLERK



## TABLE OF CONTENTS

### Subject Index

	Page
EXPLANATORY NOTE . . . . .	2
ARGUMENT . . . . .	2
Discussion of appellees' statement of the rule that this Court will not disturb a jury's verdict if there is any substantial evidence to support it. (Appellees' brief, page 22) . . . . .	3
The evidence relied upon by appellees in their Statement of the Case (appellees' brief, pp. 3-22) is insufficient to sustain the verdict . . . . .	4
Discussion of appellees' "Point II" and cases cited. (Appellees' brief, page 24) . . . . .	14
Discussion of appellees' "Point III". (Appellees' brief, page 27) . . . . .	18
Discussion of appellees' computations of the quantity of water discharged in excess of stream flow at the peak of the flood . . . . .	22

## TABLE OF CASES CITED AND DISCUSSED

	Page
Allen v. K. P. Timber Co., Or. Adv. Sheets, Vol. 22, p. 653 (1935) .....	17
Anderson v. Rucker Bros., 107 Wash. 596, 183 Pac. 70 (1919) .....	15
Box v. Jubb, (1879) L. R. 4 Exch. Div. 76.....	16
Crawford v. Cobbs & Mitchell Co., 121 Or. 628, 257 Pac. 16 (1927).....	16-17
Dahlgren v. Chicago M. & St. P. Ry. Co., 85 Wash. 395, 148 Pac. 567 (1915).....	15
Davison v. Snohomish County, 149 Wash. 109, 270 Pac. 422 (1928).....	16
Eikland v. Casey, 290 Fed. 880 (C. C. A. 9th, 1923) .....	20
Leach v. Ericksen, 161 Wash. 473, 297 Pac. 738 (1931) .....	31
Nichols v. Marsland, (1876) L. R. 2 Exch. Div. 1	16
O. W. R. & N. Co. v. Williams, 268 Fed. 56 (C. C. A. 9th, 1920).....	14
Pennsylvania Railroad Co. v. Chamberlain, 228 U. S. 333, 77 L. ed. 825 (1933).....	16
Quillen v. Schimpf, 133 Or. 581, 291 Pac. 1009 (1930) .....	16-17
Rylands v. Fletcher, (1868) L. R. 3 H. L. 330..	15
Stinson v. Business Men's Accident Ass'n, 43 F. (2d) 312 (C. C. A. 10th, 1930).....	3
Thomson v. Virginia Mason Hospital, 152 Wash. 297, 277 Pac. 691 (1929) .....	16
United States v. Kerr, 61 F. (2d) 800 (C. C. A. 9th, 1932) .....	32

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

INLAND POWER AND LIGHT COMPANY,  
a corporation,

Appellant,

vs.

FAY M. GRIEGER and MARY LOIS GRIEGER,  
Appellees.

---

Appellant's Reply Brief

---

Upon Appeal from the District Court of the United States  
for the Western District of Washington,  
Southern Division.

---

---

**APPELLANT'S REPLY BRIEF****Explanatory Note**

Upon checking the exhibits in the clerk's office we find that in appellant's opening brief we confused, and in all our references reversed, the official numbering of exhibits 9 and 13. This error arose from our lack of access to the original exhibits at the time that brief was written, and from the fact that the witness Calkins referred to "Exhibit 9" as "a record of the gauge height of Lake Merwin Reservoir, *taken at the dam*". (Tr. 91). We assumed from his language that he was referring to the chart of the Gurley Graphic Recorder, which is recorded at the dam. Mr. Calkins, however, was apparently referring to the computations made in his office from the Gurley Graphic Recorder weekly charts. If the Court, in considering the briefs of both parties, will kindly, for reference purposes, renumber Exhibit 9 as Number 13, and Exhibit 13 as Number 9, confusion will be avoided. We regret the mistake, and appreciate opposing counsel's cooperation in maintaining our numbering of these two exhibits in their brief. To avoid further confusion we are maintaining the same reversed numbering of these two exhibits in this reply brief.

**ARGUMENT**

In answering appellees' brief we shall limit ourselves to pointing out certain gross inaccuracies in their counsel's statements regarding the evidence, and will also undertake to show the fallacious character of some of

their computations of the quantities of water discharged through the gates of the dam at certain times.

Before analyzing appellees' computations of the quantity of water which they claim passed through the gates of the Ariel dam on the night of the peak of the flood, we will discuss the testimony which appellees assert supports the verdict.

**Discussion of appellees' statement of the rule that this Court will not disturb a jury's verdict if there is any substantial evidence to support it.**

**(Appellees' brief, page 22.)**

At page 22 of appellees' brief cases are cited in support of the general principle that this Court will not "weigh" the evidence, but must sustain the verdict if there is any *substantial* evidence to support it, and that this Court's decision must be based upon a consideration of the evidence most favorable to appellees' cause. We take no issue with that general statement of the applicable law, but maintain, and will undertake to show, that the testimony relied on by appellees as supporting the verdict fails to prove any facts showing negligence or from which negligence might properly be inferred. In considering the sufficiency or insufficiency of the evidence it is important to remember, as held in *Stinson v. Business Men's Accident Association*, 43 F. (2d) 312, at 314 (C. C. A. 10th; 1930), that whether a judgment is sustained by any substantial evidence is a question of law for the court.



The evidence relied on by appellees in their Statement of the Case (appellees' brief, pp. 3-22) is insufficient to sustain the verdict.

We will first examine the testimony of Frank Hastings Miles, quoted in part at pages 8 to 9 of appellees' brief. After stating that December, 1933, was very rainy, as to which there is no dispute, this witness states, "The rain didn't affect the flow of the Lewis River down at my place, but it was filling the dam." Appellees' Exhibit 9, which is the United States Bureau of Geological Survey's own tabulated record of the mean daily elevations of the water surface of the lake, and which is compiled by that office from the weekly recordings of the Gurley Graphic Recorder at the dam, shows that on October 1, 1933, the mean elevation of the lake was 236.75 feet. From that date until December 22 *the lowest mean daily elevation was 233.7 feet*, occurring on November 1. On December 1, 1933, the mean daily elevation was 235.0, and on December 21 was 236.9 (Ex. 9). The peak at or near midnight of that day was 237.6 (Ex. 13). The "filling" of the reservoir in December, as to which the witness Miles undertakes to testify, was thus necessarily limited to the difference between the elevation on December 1 of 235.0 and the peak of 237.6 on the night of the 21st, and of this trifling difference of 2.6 feet, 2.3 feet was stored on December 20 and 21 in an effort by the operators of the dam to reduce the down river flood waters which in the early evening of the 21st had already "pretty generally flooded" the Town of Woodland (Tr. 56).



As to these December rains' having no effect on the river where the witness Miles lived (three miles below the dam), let us look again at the United States Geological Survey's record (Ex. 10) which shows the mean discharges of water at the Ariel Dam for the entire month of December, expressed in second feet. Exhibit 10 shows a mean daily flow of 39,100 second feet on December 6 and shows a rise of over 30,000 second feet from the previous day. It also shows a mean discharge of 52,600 second feet on December 10. It should be noted that these stream flows were both recorded *at the government's own gauging station* a half mile below the dam. And yet the witness Miles testifies that the rains "didn't affect the flow of the river"! It will further be noted that the mean daily discharge of 52,600 second feet occurring on December 10 required almost the entire discharge capacity of two of the large gates, and that the peak flow on that date required slightly more than their entire discharge capacity. (See log entries for December 10, Ex. A-2, and their tabulation in Table I of Appendix to appellant's opening brief).

We turn to the quoted testimony of the witness Miles as to gate positions on December 20 (Appellees' brief, p. 9) wherein he expresses the opinion that gate "No. 1 was up about 10 feet or maybe more, and No. 2 \* \* \* was out about six or eight feet, but the others was tight". (Tr. 115). The capacity of Gate No. 1 is 7,000 second feet, and of Gate No. 2 is 30,000 second feet *when the lake elevation is 237 feet* (Tr. 79), so the maximum possible discharge capacity of these two gates, if

then in the positions testified to by the witness Miles, would necessarily be somewhat less than 15,000 second feet (approximately  $10/26\frac{1}{2} \times 7,000$  for Gate No. 1 plus  $8/26\frac{1}{2} \times 30,000$  for Gate No. 2).

Referring to gate positions on December 21 the witness Miles testifies (Tr. 115-116): "The gates on the 21st were about in same condition as they was the last time I seen them. On the 21st the gates was just the same as the day before. They might have been up a little; not much." (Tr. 116). But the government's estimate of the mean discharge of water at the Ariel Dam on December 20 was 44,600 second feet, and 84,600 second feet on December 21 (Ex. 10), quantities which obviously could not be discharged through the gates if in the positions claimed by Mr. Miles. In this connection, and without repetition here, we invite the Court's attention to the concurrent down stream water conditions, including conditions at Woodland on December 20 and 21, as set forth at pages 69 to 73 of appellant's opening brief and taken directly from the testimony of appellees' witnesses, none of whom was in the employ of or connected with appellant. Where, then, is the *substantial* character of the testimony of Mr. Miles which, if true, would mean that gate positions at which less than 15,000 second feet of water could be discharged resulted in the discharges shown by official government records as well as in the down stream water havoc disclosed by the testimony?

Appellees next quote the testimony of Carl E. Insull (Appellees' brief, pp. 9-10; Tr. 57-66) confirming the

record that the peak of the flood was between 12 and 1 o'clock in the morning of December 22nd, but there is nothing in his testimony showing or creating any implication of negligence on appellant's part.

The testimony of Grady Phillips, quoted at page 10 of appellees' brief, is of the negative type. He did not notice any cutting of the lands "up to the 20th" (Tr. 69) but believes the river "was flowing down through the swale on Grieger's place on the 20th, where the wash occurred". (Tr. 74). He saw the river "some time before noon" on December 21 (Tr. 73). On that morning the discharge at the Ariel dam was 73,000 second feet (Tr. 129). His next observation of the river was on the morning of the 22nd. The river "was more like an ocean than it was like a river, then". As the discharge at the Ariel Dam on that day varied from a peak of 129,000 (Tr. 97) at about midnight to 112,600 at 2 P. M. of that day (Tr. 142) such a flow of water was, at its minimum *more than 50% greater than when the witness had last observed it on the 21st*, but that condition does not prove negligence or create any inference of negligence.

At pages 11-13 of their brief counsel quote the testimony of appellee Grieger. His testimony was also quoted at considerable length in our opening brief. As to his testimony it need only be remarked that if the water was flowing through the swale on his land on December 20, as testified to by his neighbor Phillips (Tr. 74), under a maximum daylight spill of but 56,000 second feet (Tr. 129) and was 5 or 6 feet deep across his land on Thursday afternoon, the 21st, as testified to by Mr.

Grieger himself, when the discharge at Ariel was but 78,000 second feet (Tr. 129), his lands could not fail to have been damaged under all the subsequent water conditions shown by the record during the entire evening of December 21, and detailed at length in our opening brief.

It should be noted that the witness Carl E. Insull testified that his place "lays at about the same elevation as the Grieger property". (Tr. 67). It therefore necessarily follows that the Grieger lands, which were a light silt soil washed in by flood waters of prior years (Tr. 187), were subjected to the same damaging flood and current that were so "terrible" at 4 A. M. on December 21 that Mr. Insull could not get out of his house. (Tr. 62-63; 67).

Mr. Grieger in substance admits that the main current of the river was running through his lands on the 21st and that they were being damaged on that date. Note his significant statements (Tr. 158): "*Up until the 21st* the current had been running out in the channel more. \* \* \* Prior to the 20th it was not cutting away any of my land. I did not observe the current cutting away any of my land *up to the 21st.*" (Italics ours).

It should also be noted in this connection that appellees' engineer Roberts testified that erosion would start at a flow of approximately 50,000 second feet, and would progressively increase as the volume of water increased (Tr. 194-195). As the Grieger lands were sub-

jected to a flow of that quantity of water, or greater, during much of December 20th and all of December 21st, it was the duty of appellees to furnish for the guidance of the jury *some evidence* as to what part of their damage was caused by the *less than the natural stream flow* to which the Grieger lands were subjected on those dates. These facts, so indisputably shown in the record, make applicable the rule of law emphasized at pages 90 to 91 of appellant's opening brief, namely, that it was appellees' burden to prove what part of their damage was caused by the natural stream flow and what part, if any, by appellant's negligence, if appellant was in fact negligent. Such proof required evidence as to the velocity of the water and proof of the various stages of stream flow at which appellees' lands would be flooded to various depths; but inasmuch as appellees' engineer Roberts frankly admitted he could furnish no information on this subject "without more data" (Tr. 189-190; 184-185), we wonder how the jury arrived at its verdict, unless by sheer guesswork.

At pages 7 to 8 of their brief appellees impliedly challenge the accuracy of the company's log (Ex. A-2), and state that its accuracy "was a question of fact for the jury to determine". There is no testimony disputing its accuracy until counsel question it in their brief. It will be noted that counsel accept as true the time and extent of the final gate positions at 12:16 A. M. on December 22, and the quantity of 129,000 second feet then discharged, but impliedly now challenge the accuracy of the earlier log readings in order to lay the foundation



for their fantastic calculations of the amount of water which they claim was discharged at that time in excess of the concurrent natural stream flow. The log was produced by a witness called by appellees, and its accuracy is accepted by the Federal Government, in that the discharges of water at the dam are "determined from gate operations and from lake elevations", and the discharges of water so ascertained are considered "so thoroughly accurate" that the United States Bureau of Geological Survey "prepared them for publication on a daily basis". (Tr. 96)

At page 8 of their brief appellees criticize appellant's impounding of the flood waters, and its failure to let them "run off as they were wont to do by nature". This contention is effectively answered at page 41 et seq. of appellant's opening brief.

At page 10 of their brief appellees emphasize the statement of Superintendent Shore that he did not start to close any gate until 2 P. M. on the afternoon of December 22, although he testified that he could have closed all or any of them at any time. At page 87 of the Transcript of Record Mr. Shore gave his reasons for his handling of the gates in the manner shown by the record, and no witness testified that any operator's judgment in the circumstances would or should have been differently exercised.

At page 13 of their brief appellees contradict the very record which they themselves introduced (Ex. 9)

by stating that during December “and particularly from the 5th to the 22nd of December, 1933, the company kept backing up the Lewis River behind its dam, increased its storage and raised the elevation of its reservoir to more than 237 feet”. We have already discussed this matter to some extent in connection with our comments on the testimony of the witness Miles, but the inaccuracy of counsel’s statement and the inaccuracy of the statement in the same paragraph (p. 13) that “the river below the dam was kept at a low stage for several days prior to the tragic and abrupt release of waters at 12:16 A. M., December 22nd, 1933” are conclusively demonstrated by the government’s own records (Exhibits 9 and 10), from which the essential data are tabulated for the entire month of December, 1933, as Table II, Page V in the appendix to appellant’s opening brief. We do not follow counsel’s argument on this point, unless they intend to imply that earlier in the month appellant, by the exercise of some prophetic power, should have then known that an unprecedented flood was coming, and should at that time have prepared for it by releasing waters then stored in the reservoir, thus securing additional storage capacity for the emergency that was to come but thereby at that time augmenting the natural stream flow—the very act which, when done on December 22nd for reasons explained by Superintendent Shore at page 87 of the transcript, counsel now criticize, and which appellees have made the basis of this action for damages.

At page 15 of their brief appellees’ counsel criticize appellant’s counsel for having shown in appellant’s open-



ing brief (pp. 56 to 57; 73) the *average* quantity by which the concurrent natural stream flow was augmented during December 22nd. The reason for appellant's so doing was that that was exactly what was shown by appellees' own engineer, Mr. Roberts (Tr. 177; 185-186). Not a question was asked of Mr. Roberts, or of any other witness, concerning the quantity of water, if any, by which the concurrent natural stream flow was augmented at the moment the remaining opening of Gate No. 5 was completed at 12:16 A. M. on the 22nd, or during the 30-minute period shortly after midnight, or during any other period except for the entire 24 hours of December 22nd. The attempted computations of an alleged excess of water discharged over the concurrent natural stream flow for that 30-minute period first appear in appellees' brief. We will answer them fully later in this brief.

On the same page (15) counsel question appellant's ability to close the gates manually, notwithstanding the introduction of the photograph of the particular mechanism by which that is effected (Ex. A-1) and the positive and uncontradicted testimony of two witnesses that it could be done. (Tr. 48; 86; 124.) That the presence or absence of electric power was not the determining factor in regulating the closing of the gates on December 22nd is evident from the fact that when the first partial gate closing was made at 2 P. M. on December 22nd, the operators, in the further exercise of their judgment, continued to let the discharge slightly exceed the concurrent natural stream flow. (Ex. 13)

At page 10 of their brief appellees' counsel refer to the "evident reluctance" of Mr. Shore to testify, and a similar comment appears at page 16. There is not the slightest excuse for any such comment, as a reading of the testimony of the witnesses Schmidt and Shore, as well as of Griswald, consulting engineer, discloses. Mr. Shore did disclaim ability to *remember* hourly discharges of water and corresponding gate positions during the month of December (Tr. 80-81), but supplied all such information by reference to the power house log. (Tr. 83-86; 125-130; 141-143.) Had any witness attempted to furnish such information from memory he could justly be accused of merely guessing.

At pages 16 to 22 of appellees' brief extensive quotations from the record have been set forth for the purpose of showing the value of appellees' river bottom lands, and the nature and extent of the damage caused to them by the flood waters. There is no present issue as to the value of the lands or of the damage to them caused by the flood waters, but, as pointed out in the authority cited at pages 37-38 of appellant's opening brief, the mere showing of damage to appellees' lands or of the pecuniary amount of such damage creates no implication of negligence. The fundamental issues to be determined from the record are: (1) whether appellant was negligent in its storage of the waters or in their discharge through the gates of the dam in the manner and in the circumstances shown in the record; and (2) the pecuniary damage, if any, caused by appellant's release of water in excess of the concurrent natural stream flow, if

in the circumstances appellant was negligent in releasing any such excess. The second of these two issues becomes immaterial unless there is substantial testimony in the record to prove the first; and if this Court should decide that there is substantial evidence supporting this first issue, there is still no substantial testimony in the record to prove the second issue.

**Discussion of appellees' "Point II" and cases cited.**

(Appellees' brief, page 24.)

At pages 24 to 27 of their brief appellees discuss the care required of those who impound the waters of a natural water course. Appellees first cite the case of *O. W. R. & N. Co. v. Williams*, 268 Fed. 56 (C. C. A. 9th; 1920). The two principal points involved in that case were: (1) the time when the statute of limitations began to run; and (2) whether the freshet in question was so unprecedented as to be properly held to be an act of God. The defendant's predecessor had erected barriers in the Coeur d'Alene River which cut off an overflow channel which had carried water in former freshets. The defendant maintained such barriers, thereby leaving an insufficient channel for the carriage of flood waters. The flood in that case was held not to have been so unprecedented as to constitute an act of God, and the Court decided that the defendant's act in so blocking part of the river's channel as to leave insufficient channel capacity to carry the water, thereby causing them to overflow and damage the plaintiff's lands, was negligence. In the instant case the appellees' lands were un-

der several feet of water on December 21 (Tr. 169), long before the peak of the flood and while the lands were getting less than the natural stream flow, and far less natural stream flow than they were later subjected to. The unprecedented character of the flood in the instant case has been sufficiently discussed at pages 59 to 66 of appellant's opening brief.

In *Dahlgren v. Chicago M. & St. P. Ry. Co.*, 85 Wash. 395, 148 Pac. 567 (1915), the defendant was held liable in damages for obstructing a natural gully and for not furnishing a drainage pipe of sufficient size to carry off the accumulated waters which resulted from the embankment. It is significant that in that case the Supreme Court of Washington approved the following instruction as correctly stating the rule (p. 571):

“The drain provided by the defendant (appellant) to take care of the waters of the stream \* \* \* must have been sufficient to take care of and dispose of the waters flowing down the stream at times of any ordinary freshet, *but need not have been sufficient to provide against any unprecedented flow of high water.*” (Italics ours)

We are somewhat surprised to see counsel citing the old English case of *Rylands v. Fletcher*, L. R. 3 H. L. 330 (1868), as it not only does not represent the general rule in this country but has been expressly rejected by the Supreme Court of the State of Washington in *Anderson v. Rucker Bros.*, 107 Wash. 595, 183 Pac. 70 (1919), from which we have quoted at some length on this point at pages 76 to 78 of appellant's opening brief.

Even in England the rigid rule of "liability without fault" imposed by *Rylands v. Fletcher* has been modified in cases where the damage results from the concurrence of an act of God or from concurrence of the act of a stranger.

See *Nichols v. Marsland*, L. R. 2 Exch. Div. 1 (1876).

*Box v. Jubb*, L. R. 4 Exch. Div. 76 (1879), discussed in 10 Or. Law Rev. 192.

*Crawford v. Cobbs & Mitchell Co.*, 121 Or. 628, 257 Pac. 16 (1927), cited by appellees, has been cited at pages 88 and 97 of appellant's opening brief. This case loses much of its significance from appellees' standpoint when it is recalled that the Supreme Court of Oregon, following the state constitutional requirement, is committed to the "scintilla of evidence" rule—a rule which has been definitely rejected by the Federal Courts (*Pennsylvania Railroad Company v. Chamberlain*, 228 U. S. 333, at 343, 77 L. ed. 825 (1933)—appellant's opening brief, page 98) as well as by the Supreme Court of the State of Washington in *Thomson v. Virginia Mason Hospital*, 152 Wash. 297, at page 301, 277 Pac. 691 (1929). See also, to the same effect, *Davison v. Snohomish County*, 149 Wash. 109, at p. 116, 270 Pac. 422 (1928), and cases cited therein. The inflexibility of the rule in Oregon is well illustrated in the case of *Quil-*



*len v. Schimpf*, (1930) 133 Or. 581, 599; 291 Pac. 1009, 1015, wherein it is said:

“In their zeal to preserve the trial by jury inviolate, the people of the state of Oregon enacted the following provision of the fundamental law: ‘The right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.’ Or. Const. art. 7, §3c. That language is clear, plain, concise, and means just what it says.”

The case of *Allen v. K. P. Timber Co.*, Oregon Adv. Sheets Vol. 22, p. 653 (Dec. 1935) last cited by appellees, was an action for wrongful death resulting from the bursting of a temporary earth fill. The defense of “act of God” was raised, but the Court held that the flood was one which could have been anticipated and guarded against by the defendant. The Court, following its decision in *Crawford v. Cobbs & Mitchell Co.*, 121 Or. 628, 257 Pac. 16 (1927), held that it was negligence to permit a large volume of water to escape suddenly to another’s damage, but the facts of the case were so different from those in the case at bar as to make the decision of little value in passing upon the sufficiency of the evidence to support the verdict in the instant case.

At page 26 of their brief appellees’ counsel refer to appellant’s “opening everything wide open”. We hardly need to call the Court’s attention to the misleading character of this language, its utter variance with the facts, and that the “opening everything wide open” must prop-

erly be confined to the completion of the opening of Gate No. 5, already at the time open from 9 to 13 feet. (Tr. 133)

Discussion of appellees' "Point III"

(Appellees' brief, page 27.)

Under this heading appellees assert that "The question of whether the flood conditions complained of were an act of God was one for the jury", and that even if the flood was an act of God appellant would yet be liable if its negligence concurred with the "unusual flood conditions" to produce injury to appellees' property. As a proposition of law, appellees' statement is inaccurate unless modified to limit appellant's liability to *that part of the damage*, if any, caused by its own negligent act, if appellant was guilty of any negligent act. Under no circumstances could appellant properly be held liable for damage caused to appellees' lands by the natural flood flow of the stream. There is not a word of testimony in the record challenging either the oral testimony of the witnesses or the record evidence of the Bureau of Geological Survey as to the unprecedented character of the flood. (See our opening brief pp. 59 to 66.) The cases cited at pages 90 to 91 of our opening brief make clear the rule that, even though found to be negligent in the character of its operations, appellant could under no circumstances be held liable for damage caused by the natural flood flow.



We find nothing in any of the five cases cited at page 27 of appellees' brief that holds a defendant liable for damage caused by the forces of nature.

Under their "argument" on pages 27 to 29 of their brief appellees' counsel make some astounding statements. We first note this one: " \* \* \* the river did not reach a danger point at any time until the impounded waters of Lake Merwin were abruptly released". Have appellees forgotten, or do they merely ignore, the conditions existing throughout December 21—appellees' lands under five or six feet of water flowing through them on that morning (Tr. 169), Insull's house surrounded by a raging torrent (Tr. 61-62), the Pacific Highway at Woodland impassable, and the town of Woodland "pretty generally flooded" (Tr. 55-56)? (See summary of conditions shown at pages 69 to 73 of appellant's opening brief.) Are appellees repudiating the testimony of their own witnesses?

Again, at page 29, counsel say: " \* \* \* the flood followed the deliberate opening of the gates". The *mean daily flow* for the entire day of December 21 (84,600 second feet; Exhibit 10) was approximately one-third greater during the entire 24 hours of that day than the highest known prior *instantaneous* peak. (Tr. 103.) But appellees' counsel ignore this, and strive to create the impression in their brief that there was no flood until December 22nd.

At page 28 of their brief appellees' counsel make the following statement:

“The whole doctrine of immunity from the results of Acts of God is predicated upon the proposition that they are so sudden that man cannot foresee them or guard against their consequences.”

and cite the case of *Eikland v. Casey*, 290 Fed. 880, as supporting that statement. While many acts of God, such as cyclones or earthquakes, are sudden, we know of no case that would hold appellant liable for the cumulative effects of a flood that steadily increased in magnitude to a point far beyond anything known on the Lewis River within the memory of man.

At page 29 counsel state:

“The uncontradicted evidence shows that the cutting away of plaintiffs' land did not occur until after midnight of December 22, and that the destruction of plaintiffs' property was concurrent in time with the release of the impounded waters of Lake Merwin.”

We respectfully assert that the evidence establishes no such fact. No witness offered any testimony as to what was happening on Mr. Grieger's land during the steadily increasing flood of Thursday, the 21st, or at any time on that day after Mr. Grieger had observed it when flowing at but 78,000 second feet. Mr. Grieger

himself says: "as to how late I was up Thursday night, —in the neighborhood of 10:30. I did not stay up watching this flood at all." (Tr. 171) Nor did any other witness furnish any testimony as to what took place on the Grieger lands while the actual stream flow (at all concurrent times less than the natural stream flow) steadily mounted to 105,000 second feet at 10 P. M. on the night of the 21st. (Tr. 129)

Again, at page 30 of their brief appellees' counsel repeat their misstatement that "shortly after midnight, on December 22nd, 1933, the Defendant Company opened their flood gates, wide open". We need not comment further on this distortion of the record.

On the same page (30) counsel again ignore the testimony by saying that the company's failure to close the gates manually gives rise to an inference that it was unable to do so, and that the company failed to explain why it did not do so. Counsel's inquiry is specifically and fully answered by the witness Shore at page 141 of the Transcript of Record. Appellees are bound by this testimony. (See appellant's opening brief, pp. 100-101.)

At the top of page 31 of their brief appellees' counsel again impugn the accuracy of the company's log (Ex. A-2). As the government itself accepts the log as accurate (Tr. 96) it would seem that the quotation appearing at page 100 of appellant's opening brief furnishes a sufficient answer to counsel's unwarranted aspersions upon the integrity of the log record.

Discussion of appellees' computations of the quantity of  
water discharged in excess of stream flow at  
the peak of the flood.

At page 40 of their brief appellees charge appellant with having "conveniently omitted" from Table I of the Appendix to its opening brief "the record" from 12:16 A. M. to 2:00 P. M. of Friday, December 22nd, and counsel thereupon proceed to supply certain additional "data". Counsel's comment ignores the purpose of said Table I, as stated in its caption, which was to take from the record and show *all changes in gate positions and concurrent lake elevations and discharges* from December 1 to 1:00 A. M. on December 23rd, the time when the record ends. All such data are shown therein. As no change was made in the position of the gates from 12:16 A. M. to 2:00 P. M. on December 22 no part of the record is omitted within the declared purpose of said Table I.

In the first two lines of the tabulation appearing at page 40 of appellees' brief, and which they claim is compiled from Exhibit No. 13, they state that at 12:16 A. M. on Friday, the 22nd, the lake elevation was 237.6 and the spill 129,000 second feet, and that at 12:46 A. M. (30 minutes later) the elevation was 237, the spill not being stated. This "data" neither conforms to the testimony nor to Exhibit 13. Engineer Calkins of the Bureau of Geological Survey, who was certainly as compe-

tent as counsel to read and interpret Exhibit 13, testified:

“The scale is quite small, but as nearly as one can tell from the record the peak elevation (237.6) was reached at midnight on the 21st, possibly a few minutes before. That is a few minutes before the beginning on the 22nd.”

We do not understand why counsel set forth in their tabulation, as “data” taken from Exhibit 13, the statement that the elevation of the lake was still 237.6 at 12:16 A. M. and that the elevation dropped six-tenths of a foot during the ensuing 30 minutes and reached elevation 237 at 12:46 A. M. on the 22nd. An examination of Exhibit 13 does not support those statements. On the contrary, Exhibit 13 shows clearly that the gauge dropped five-tenths of a foot within the 16-minute period following midnight. That 16-minute period was coincident with the completion of the final 17½ foot opening of No. 5 gate.

At page 5 of their brief appellees attempt to demonstrate that during the 30-minute period “immediately succeeding midnight” on December 22 the average discharge from the spillway was 48,400 second feet in excess of the concurrent natural stream flow. The only possible basis on which to support such a finding would be the assumption that during that 30-minute period the surface of the entire lake of 4000 acres actually dropped 6 inches. As we shall demonstrate, it is inconceivable that such an assumption could be in any degree accurate.

Appellant's brief (page 53) shows it to be impossible to discharge 87,120,000 cubic feet of water (the quantity which would represent a lowering of the elevation of the lake surface by 6 inches) during the 16-minute period between midnight and 12:16 A. M. on December 22, through an opening in Gate No. 5 capable of discharging only 11,520,000 cubic feet of water during that period of time. The only way 87,120,000 cubic feet of water in excess of stream flow could have been discharged during that 16-minute period through the then existing spillway openings, namely, all five gates fully opened, would have been for the natural stream flow to have suddenly decreased its volume by 75,600,000 cubic feet (that quantity representing the difference between 87,120,000 cubic feet which appellees' brief states was suddenly discharged in excess of stream flow) and the 11,520,000 second feet capable of being discharged through the additional spillway capacity created by the final 17½-foot opening of No. 5 gate. 75,600,000 cubic feet divided by 960 seconds (or 16 minutes) equals 78,750 cubic feet. That great reduction in natural stream flow would have lasted only 16 minutes, or 960 seconds, as the record made by the pencil on the chart indicates that the decrease in lake level was very slight during the following 14 minutes of that 30-minute period (from 12:16 A. M. to 12:30 A. M.). Consequently, if counsel's assumptions are sound, the natural stream flow



must have again suddenly increased to over 100,000 second feet. Thus we would have a condition of a sudden cessation of natural stream flow of approximately 75%, or to 25% of its then full volume, for 16 minutes, followed by an immediate rise and return to approximately its former full volume. This is so utterly improbable and unbelievable that the correctness of the data on which it is based, namely, the record made by the pencil on the chart for this short period, must be questioned.

A common method of demonstrating the absurdity of any conclusion is to assume as true a premise known to be false, and then show the absurdity of such assumption by obtaining results which in themselves are either impossible or inconceivable. By assuming, as appellees' counsel do, that the almost vertical mark made by the pencil on the elevation chart (Ex. 13) during the 16 minutes of final opening of gate No. 5 proves a correspondingly rapid lowering of the entire surface of the lake during that 16-minute period, the unreasonableness of such an assumption can be shown graphically and also proven by computation. We will undertake to do so.



For purposes of assumption, not admitting its correctness as representing the actual lake elevations after midnight on the 22nd, and to test the accuracy of the mathematical calculations made by appellees' counsel, the following record is compiled from Exhibit 13:

TABLE A.

Day	Hour	Chart Record Exhibit 13 Elevation	Approx. Amount of Spill, Sec. ft.	
Dec. 21	10:00 p.m.	237.4	105,000	(EX. A-2)
"	11:00 p.m.	237.5	100,000	(EX. A-2)
"	12:00 midnight	237.6	105,000	} Gate position same as at 10:00 p.m.—Tr. 133.
Dec. 22	12:16 a.m.	237.1	129,000	
"	12:30 a.m.	237.0	128,255	} Proportionate decrease in spill with gates in same position and decreasing lake level.
"	2:00 a.m.	236.8	126,765	
"	4:00 a.m.	236.5	124,530	
"	6:00 a.m.	236.1	121,550	
"	8:00 a.m.	235.8	119,315	
"	10:00 a.m.	235.5	117,080	
"	12:00 noon	235.2	114,845	
"	2:00 p.m.	234.9	112,600	(Tr. 142)

COMPUTATION FOR ACTUAL STREAM FLOW  
BASED ON ABOVE ASSUMPTION

Period 10:00 p.m. Dec. 21 to 11:00 p.m. Dec. 21:

Average discharge through gates 102,500 sec. ft.

Actual increase in lake elevation 0.1 ft.

0.1 ft. = 400 acre feet in 1 hour = 9600 acre ft. per  
day = 4800 sec. ft. average increase over spill.

Average stream flow for period = 102,500 + 4800 =  
107,300 sec. ft.

Period 11:00 p.m. Dec. 21 to 12:00 midnight Dec. 21:

Average discharge through gates 102,500 sec. ft.

Actual increase in lake elevation 0.1 ft.

0.1 ft. increase = 400 acre ft. in 1 hour = 9600 acre ft.  
per day = 4800 sec. ft. average increase over spill.

Average stream flow for period =  $102,500 + 4800 =$   
 $107,300$  sec. ft.

Period 12:00 midnight Dec. 21 to 12:16 a. m. Dec. 22:

Average discharge through gates 117,000 sec. ft.

Assumed decrease in lake elevation 0.5 ft.

0.5 ft. decrease = 2000 acre ft. in 16 minutes = 180,000  
acre ft. per day = 90,000 sec. ft. average decrease  
from spill.

Average stream flow for period =  $117,000 - 90,000$   
 $= 27,000$  sec. ft.

Period 12:16 a.m. Dec. 22 to 12:30 a.m. Dec. 22:

Average discharge through gates 128,627 sec. ft.

Assumed decrease in lake elevation 0.1 ft.

0.1 ft. decrease = 400 acre ft. in 14 minutes = 41,140  
acre ft. per day = 20,570 sec. ft. average decrease  
from spill.

Average stream flow for period =  $128,627 - 20,570$   
 $= 108,057$  sec. ft.

Period 12:30 a.m. Dec. 22 to 2:00 a.m. Dec. 22:

Average discharge through gates 127,510 sec. ft.

Assumed decrease in lake elevation 0.2 ft.

0.2 ft. decrease = 800 acre ft. for  $1\frac{1}{2}$  hours = 12,800  
acre ft. per day = 6,400 sec. ft. average decrease  
from spill.

Average stream flow for period =  $127,510 - 6,400 =$   
121,110 sec. ft.

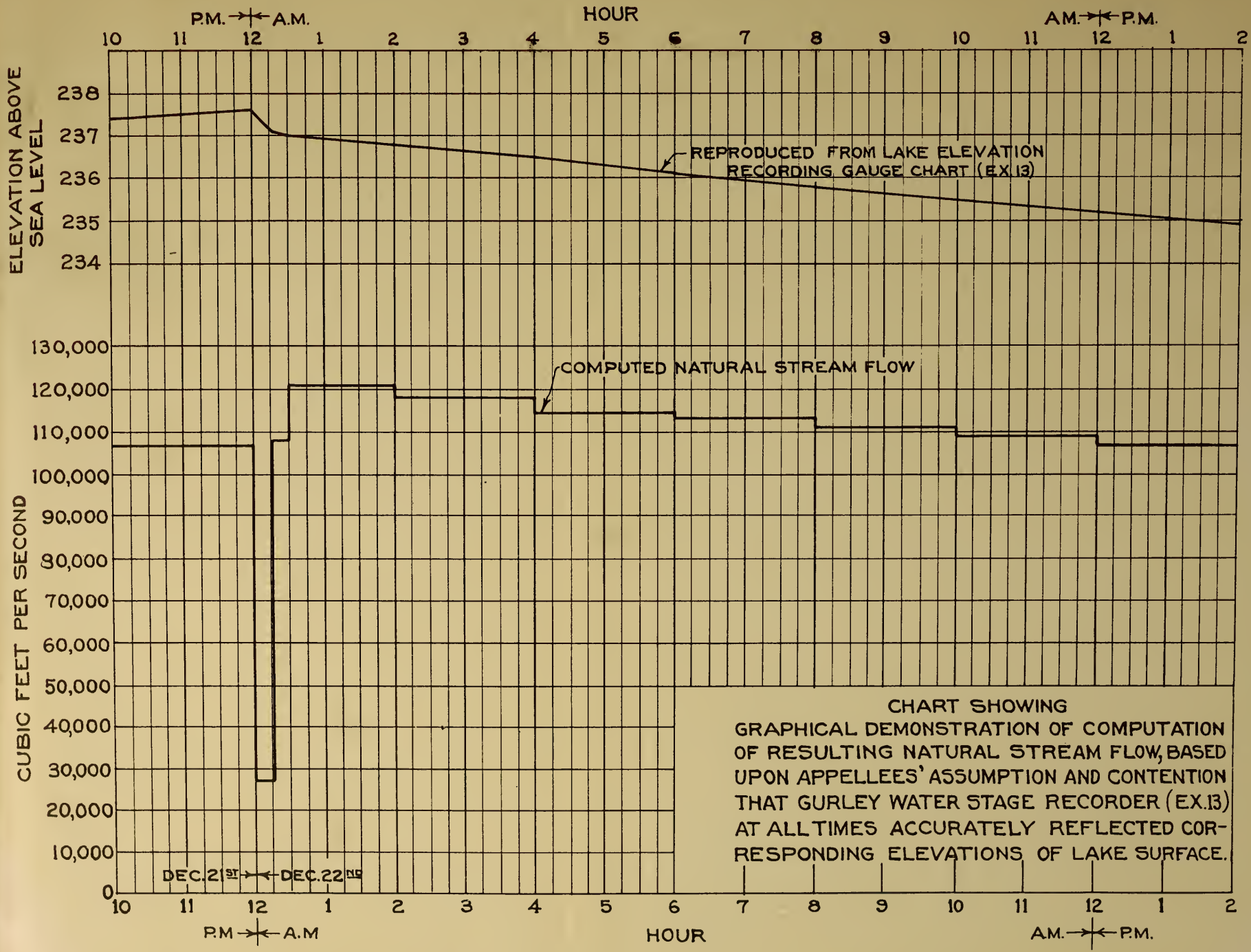
Repeating this computation similarly for each period,  
and tabulating the results, we get Table B and Chart A,  
following.

TABLE B.

Day	Hour	Recorded Elevation Shown by Exhibit 13 Ft. above Sea level	Fluctuation in Recorded Elevations Between Time shown Ft.	Spill Through Gates Sec. Ft.	Average Spill Between Time shown Sec. Ft.	Average Added to Lake Between Time shown Sec. Ft.	Average Drawn From lake Between Time shown Sec. Ft.	Average Natural Stream flow Between Time shown Sec. Ft.
Dec. 21	10:00 p.m.	237.4		105,000				
			+ .1		102,500	4,800	0	107,300
Dec. 21	11:00 p.m.	237.5		100,000				
			+ .1		102,500	4,800	0	107,300
Dec. 21	12:00 mid.	237.6		105,000				
			— .5		117,000	0	90,000	27,000
Dec. 22	12:16 a.m.	237.1		129,000				
			— .1		128,627	0	20,570	108,057
Dec. 22	12:30 a.m.	237.0		128,255				
			— .2		127,510	0	6,400	121,110
Dec. 22	2:00 a.m.	236.8		126,765				
			— .3		125,647	0	7,200	118,447
Dec. 22	4:00 a.m.	236.5		124,530				
			— .4		123,040	0	8,600	114,440
Dec. 22	6:00 a.m.	236.1		121,550				
			— .3		120,432	0	7,200	113,232
Dec. 22	8:00 a.m.	235.8		119,315				
			— .3		118,197	0	7,200	110,997
Dec. 22	10:00 a.m.	235.5		117,080				
			— .3		115,962	0	7,200	108,762
Dec. 22	12:00 noon	235.2		114,845				
			— .3		113,722	0	7,200	106,522
Dec. 22	2:00 p.m.	234.9		112,600				



# CHART "A"







Referring to the last column of Table B it will be noted that if the record made by the pencil on the elevation chart indicated a true lake elevation after midnight, as has been assumed, the average stream flow between 11:00 p. m. and midnight was 107,300 second feet; for the next 16 minutes the average stream flow would have dropped to 27,000 second feet, or approximately 25% of full volume; and during the following 14 minutes between 12:16 A. M. and 12:30 A. M. it would have again risen to 108,057 second feet, or nearly full volume. Such conclusion is so at variance with sound reasoning that the premise upon which the conclusion was based was obviously erroneous.

In appellees' brief, page 39, appellant's contention that the opening of No. 5 gate to its full open position had some disturbing effect on the mechanism of the recording gauge is questioned by the query as to why the closing of the gate should not have had a corresponding effect on the gauging mechanism. The effect on the gauging mechanism caused by the swirling action of the water which exerted a suction effect on the water level in the stilling well, which in turn was caused by the full opening of No. 5 gate, continued from 12:16 A. M., when No. 5 gate was finally fully opened, to 2:00 P. M. December 22 when No. 5 gate was again partially closed. The discrepancy between the recorded elevation on the chart and the true elevation of the water surface of the lake was greatest at 12:16 A. M. when the lake elevation was at its maximum height, with a gradual diminishing discrepancy as the lake elevation dropped, and with a

final elimination of the error when the combination of reduced lake level and closing of No. 5 gate was sufficient to stop the swirling action which had exerted a suction on the stilling well. The exact performance of the gauging mechanism when No. 5 gate was closed cannot be determined from the record, as that gate was still open  $8\frac{1}{2}$  feet at 1:00 A. M. on December 23rd, which is the last gate reading shown in the record. (Tr. 143.)

We have shown the fallacy of accepting the record on Exhibit 13 for the time while No. 5 gate was fully opened as a correct indication of the actual water level in the lake. We have also offered a reasonable explanation for the cause of the failure to obtain automatically a true contemporaneous record of lake elevation from Exhibit 13. There is no dispute that the actual lake level dropped 4 feet in the 24-hour period from 12:00 o'clock midnight of December 22 to 12:00 o'clock midnight of December 23, causing a corresponding discharge from the lake during this period of time of approximately 16,000 acre feet, or an average of 8000 second feet in excess of the concurrent natural stream flow; but appellees' claim that the discharge from the lake at any time during this period was at the rate of 48,400 cubic feet per second, or at any rate of discharge approaching this figure, is based upon an absurd and unreasonable premise.

In this same connection, at page 39 of appellees' brief their counsel quote, with emphasis, the testimony

of superintendent Shore (Tr. 87) wherein he states that the drop in elevation can be determined exactly from "these government records" (Ex. 13). Obviously the drop *at the gauge itself* is so shown, but, as we have amply demonstrated, it is as illogical to contend that the elevation of the entire lake concurrently and correspondingly dropped from 12:00 to 12:16 A. M. on the 22nd as it would be to assert that a train starts from a station at the rate of fifty miles an hour, merely because the drive wheels of the locomotive momentarily slip and revolve at a rate that would normally produce that speed.

At page 41 of appellees' brief their counsel again reveal their reliance upon the testimony of the witness Miles, and refer to it as a "conflict of evidence" between his testimony and the company's log record (Ex. A-2) which "resolved itself into a question of fact for the determination of the jury". As we have already shown, the concurrent downstream water conditions so forcefully belie Mr. Miles's testimony as to the gate positions as to make it obviously contrary to physical facts. As said by the Supreme Court of Washington in *Leach v. Erickson* (1931), 161 Wash. 473, 476, 297 Pac. 738, 739:

"The verdict of a jury if contrary to natural laws or physical facts cannot be sustained. In *Fluhart v. Seattle Elec. Co.*, 65 Wash. 291, 118 P. 51, 53, we said: 'Oral statements, although undisputed, must yield to undisputed physical facts and conditions with which they are irreconcilable.'

"See, also *Mandel v. Washington Water Power Co.*, 83 Wash. 19, 144 P. 921."

To the same effect is *United States v. Kerr*, 61 F. (2d) 800, 803, (C. C. A. 9th, 1932), cited at pages 53-54 of appellant's opening brief.

We reiterate our belief that an examination of the record will convince the Court that it contains no substantial evidence in support of the verdict and judgment.

Respectfully submitted,

ELLIS & EVANS,  
OVERTON G. ELLIS,  
ROBERT E. EVANS,

LAING & GRAY,  
JOHN A. LAING,  
HENRY S. GRAY,  
Attorneys for Appellant.